

A U.N. Treaty

We All Can Support

By Captain George Galdorisi, U.S. Navy (Retired)

More than eight years after the 1982 U.N. Convention on the Law of the Sea was ratified, the United States still is not a party to the most widely endorsed international treaty ever negotiated. As nations and navies become increasingly protective of their littoral seas, U.S. failure to agree to this accord could complicate the Navy's ability to perform its missions—such as that of this F-14/D Tomcat from the USS *Abraham Lincoln* (CVN-72), on patrol in the Gulf flying over an oil tanker in support of Operation Enduring Freedom—and cause unneeded confrontation on the high seas.

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When the 1982 United Nations Convention on the Law of the Sea was submitted to the U.S. Senate for its advice and consent, the President's transmittal letter noted:

Since the 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding Administration has recognized this as the cornerstone of U.S. oceans policy. . . . Early adherence by the United States to the Convention is important to maintain a stable legal regime for all uses of the sea. . . . Maintenance of such stability is vital to U.S. national security and economic strength.¹

In the years following, the U.S. strategic paradigm, dependent as it is on littoral operations against the shore, has made accession to the convention even more compelling. The new U.S. strategy, articulated in a series of documents ranging from the National Security Strategy to "Joint Vision 2020" and the Navy's "Sea Power 21," represents a fundamental shift from open-ocean war fighting on the sea and toward joint operations conducted from the sea.² These operations are conducted in the near-land zones of special jurisdiction belonging to friendly, neutral, and potentially hostile countries. They are dependent on the navigation rights, flexibility, and mobility conferred by the 1982 Law of the Sea Convention.

The U.N. Convention on the Law of the Sea took more than a decade to produce and was the result of the largest single international negotiating project ever undertaken. One hundred fifty-nine states and other entities signed this comprehensive document, and 141 nations since have ratified it. The Convention covers virtually every aspect of the conduct of nations in the oceans environment.³ To the majority of the community of nations, it is a commitment to the rule of law and a basis for the conduct of affairs among nations over a majority of the globe.

The Convention on the Law of the Sea has become more than a treaty. It founded a new era on, under, and over the world's seas. It created the International Tribunal for the Law of the Sea and the Conference of States' Parties, among other bodies (where the United States, as a non-party, is not represented). It created new international law. It codified important elements of the customary law of the sea. It established new norms in the negotiation of multi-lateral, international treaty agreements.

U.S. National Security Imperatives

Vital and immediate U.S. interests hinge on accession to the U.N. Convention on the Law of the Sea. Our core strategic interests are critically dependent on the free access to, and unhampered use of, the 70% of the globe covered by water. This is doubly true for the national security interests of the United States and our allies. Five factors make this a compelling issue for U.S. lawmakers and

one that must be addressed immediately as a matter of national priority.

The first reason for U.S. accession to the Convention is the importance to the global economy of freedom of the seas, and the maritime flexibility and seaborne mobility that this freedom conveys. Seaborne commerce today exceeds 3.5 billion tons annually and accounts for more than 80% of the trade between nations. More than 95% of U.S. import and export trade is transported by sea, including import of almost 50% of U.S. petroleum products and trading of an increasing percentage of our gross national product (currently in excess of 20%).⁴ Agreements under the auspices of the World Trade Organization and the North Atlantic Free Trade Agreement promise to intensify this commerce.

As the world's leading trading nation and the de facto leader of the global maritime coalition, the United States must defend the ability of ships and aircraft of all nations to move freely on, over, and under the sea anywhere on earth as a universally recognized legal right. By reaffirming and codifying traditional freedoms of navigation and overflight, the Convention guarantees this mobility and flexibility, and makes it far less likely that naval forces will have to protect our economic use of the oceans.

Closely connected to this first factor is the use of military forces to enhance national security. A stable and predictable regime for the world's oceans, with each nation respecting universally agreed-to rules and procedures, is vital for the effective use of naval expeditionary forces as instruments of national policy. National security interests are tied inextricably to the need to move these sea-based forces, especially carrier strike groups and expeditionary strike groups, through territorial seas, international straits, archipelagic sea lanes, and international waters—all rights conferred to parties to the Law of the Sea Convention. In the past decade alone, there have been more than a dozen U.S. and coalition military operations that were dependent on internationally recognized transit rights and high-seas freedoms of navigation.⁵

A third reason arguing for accession to the Convention is the significant downsizing of the U.S. Navy. Against challenges to the unhampered use of the oceans, the Navy shoulders the lion's share of the responsibility to enforce U.S. rights. Today, the Navy has approximately 300 ships, and the modest rate of ship production articulated in the President's fiscal year 2003 defense budget all but guarantees that that number will continue to decrease throughout this decade.⁶

As the Navy has shrunk, its operational tempo has increased. The imperatives of a post-11 September 2001 world have increased the requirement for the Navy to defend the nation's interests forward and contribute to homeland security mission in U.S. coastal waters. This makes it even more imperative that the U.S. Navy be able to exercise the rights of innocent passage, transit passage, and archipelagic sea lanes passage without asking prior

permission of, or providing prior notification to, coastal states. Equally important is the right to operate freely and conduct military activities in the exclusive economic zones of all nations—a right that was challenged by China during the encounter with the United States in the South China Sea in April 2001.⁷ These rights are particularly important to executing the Navy's strategy of forward presence in the world's littorals, as articulated in "Sea Power 21."⁸

The requirement for naval forces to give prior notification before transiting a coastal state's territorial sea is particularly pernicious. The unsatisfactory nature of a prior-notification regime for warships—an illegal regime claimed by an increasing number of coastal states—was highlighted by noted naval law expert Jack Grunawalt when he was director of the Oceans Law and Policy Department of the U.S. Naval War College:

A notification requirement for warship transit of the territorial sea is, for all practical purposes, a requirement for authorization. To illustrate, the naval commander would ask: "How far in advance must I notify the coastal state? To whom is notification to be provided and in what language? How is it to be provided? In writing? By radio? By flag hoist? Will someone be available 24 hours a day to receive my notice? Must I await acknowledgment? Am I required to provide a track, speed of advance, and anticipated departure time and place? Am I allowed to deviate? Must I provide information pertaining to my mission? To my weapons? To my means of propulsion?"⁹

A fourth reason arguing for U.S. accession to the Convention is the political, economic, and military costs of the U.S. Freedom of Navigation Program in the face of excessive maritime claims of various states. This program, initiated in 1979 by the Carter administration, combines diplomatic action and operational assertion of our navigational rights to discourage state claims inconsistent with international law as reflected in the Convention. It is highly likely that U.S. accession to the Convention would dissuade other nations from making maritime claims counter to the Convention and would decrease the number of diplomatic challenges and operational assertions by the United States.

The fifth reason for U.S. accession to the Convention is the U.S. position as the world's leading maritime power. Clearly, U.S. refusal to accede to this Convention, widely regarded as one of the most important agreements ever ne-

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gotiated, raises fundamental questions regarding not only the future of legal regimes applicable to the world's oceans, but also U.S. leadership with respect to promoting international law and order. By remaining outside the Convention, the United States forfeits its right to influence the Convention's further development and interpretation. For example, failure of the United States to accede to the Convention precludes U.S. nomination of a judge for service on the International Tribunal of the Law of the Sea, the organization created by the Convention to adjudicate disputes at sea, or to participate as a voting member of the Conference of States' Parties.

A Strategic Window of Opportunity

The United States has much to gain from stability in laws governing the use of the seas, and a widely ratified Law of the Sea Convention can best ensure stability over the long term. Although U.S. accession to the Convention will not be a panacea, widespread ratification will increase order and predictability on the oceans, facilitate adaptation to new circumstances, narrow the scope of disputes to more manageable proportions and provide a means to resolve them, and simplify the U.S. security paradigm.

Previous objections to the Law of the Sea Convention long have been resolved by amendments to the basic treaty. Consequently, the 1982 U.N. Convention on the Law of the Sea is now "America's Convention," guaranteeing rights crucial to our political, economic, and military security. This sentiment was conveyed most recently in a 2001 resolution of the President's National Commission on Ocean Policy:

The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership role in ocean and coastal activities.¹⁰

U.S. Senate inaction has diminished U.S. sea power by marginalizing U.S. participation in the Convention regime as a full partner. Since the 1994 resolution of the objections raised in 1982, approval by the Senate should be assured once hearings are held.

The Bush administration has signaled its desire to have the United States accede to this important international treaty. Ambassador Sichan Siv, U.N. Representative on the

U.N. Economic and Social Council, reported to the U.N. General Assembly in November 2001, "I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention."¹¹ In January 2003, Assistant Secretary of State for Legislative Affairs Paul Kelly said, "The administration hopes that the Senate will move quickly to approve the UN Convention on the Law of the Sea."¹²

If the United States is to retain its credibility as a nation that promotes the rule of law in the international community, Senate leaders must place accession to the Convention high on their legislative agenda and move this treaty out of the Senate Foreign Relations Committee and to a floor vote. The ability of naval expeditionary forces to execute their important missions without unintended crisis or conflict at sea and realize the strategic vision embodied in "Sea Power 21" hinges on this reassessment.

¹¹President William J. Clinton, Letter of Transmittal to the Senate, 7 October 1994, *Congressional Record*, 140, daily ed. (6 October 1994): S14475-76.

¹²See, for example, *The National Security Strategy of the United States of America* (Washington, DC: The White House, September 2002); "Joint Vision 2000" (Washington, DC: U.S. Government Printing Office, 2000); and Adm. Vern Clark, USN, "Sea Power 21: Projecting Decisive Joint Capabilities," U.S. Naval Institute *Proceedings*, October 2002, pp. 32-41.

¹³"1982 United Nations Convention on the Law of the Sea," U.N. publication 1261 (1982), reproduced from U.N. Document/CONF.62/122 of 7 October 1982.

¹⁴*National Security and the Convention on the Law of the Sea*, 2d ed. (Washington, DC: Department of Defense, 1996).

¹⁵*Turning to the Sea: America's Ocean Future* (Washington, DC: Department of Commerce, 1998), p. 30.

¹⁶*FY 2003 Defense Budget*. The budget is presented in numerous forms. The information for the article was taken from a briefing delivered by the Secretary of Defense on the day this budget was delivered. The FY2003 defense budget called for building five Navy ships, and the President's recently submitted FY2004 defense budget proposes building seven ships.

¹⁷The Law of the Sea Convention enumerates specific rights and responsibilities in the exclusive economic zone (EEZ), granting the coastal state sovereign rights over the living resources in its EEZ, while granting other states high-seas-like freedoms of navigation and overflight in EEZs. In contravention of the Convention, China recently has contended that it has the right to restrict the operations of other nations in its EEZ.

¹⁸Clark, "Sea Power 21."

¹⁹Richard J. Grunawalt, "The 1982 United Nations Convention on the Law of the Sea: An Operational Lawyer's Perspective," in Center for Oceans Law and Policy, University of Virginia School of Law, 19th Annual Seminar: Toward Senate Consideration of the 1982 Law of the Sea Convention, 29-30 June 1995, Washington, DC.

²⁰The National Commission on Ocean Policy, chaired by former Chief of Naval Operations Admiral James Watkins, was established by Congress in the Oceans Act of 2000. The 16-member commission appointed by President George W. Bush is charged with reviewing the cumulative effects of federal ocean-related laws and programs. The resolution urging accession to the Law of the Sea Convention was the first resolution passed by this high-level commission.

²¹U.S. Mission to the United Nations Press Release #184, 7 December 2001, www.un.int/usa/01_184.htm.

²²*Congressional Quarterly Daily Monitor*, 9 January 2003.

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